LOO KIA MENG

v.

PP

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: C-05-88-95]
21 SEPTEMBER 1998

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da) - Presumption of trafficking - Invoked based on presumption of possession under s. 37(d) - Whether proper - Whether trial judge found accused having actual possession of cannabis - Principle against applying presumption upon presumption - Muhammad Hassan v. PP*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(j) - Analysis of dangerous drug - Whether samples taken for tests represented at least 10% of total - Evidence of chemist - Whether must state exact amount or weight of samples taken for tests*

This was an appeal from the decision of the High Court convicting the appellant under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 4,105g of cannabis and sentencing him to death. The grounds of appeal raised before the instant court were: (i) that the learned judge had erroneously invoked the presumption of trafficking under s. 37(da) of the Act against the appellant based upon the presumption of possession under s. 37(d) of the Act which had earlier been invoked against the appellant; and (ii) that the chemist did not analyse samples of at least 10% of the substance contained in the receptacles before concluding that it was all cannabis as defined in s. 2 of the Act.

Held:
Per Shaik Daud Ismail JCA

[1] The learned judge had never made an express and affirmative finding of fact that the appellant was in **actual** possession of the cannabis. The appellant was only deemed to have been in possession of the cannabis through the invocation of the presumption of possession under s. 37(d) of the Act after the learned judge held that he had custody and control of the cannabis. Consequently, the learned judge was wrong in invoking the presumption of trafficking under s. 37(da) of the Act against the

appellant based upon the statutory presumption of possession under s. 37(d) of the Act, *ie*, presumption upon presumption or double presumptions. (*Muhammad Hassan v. PP* followed.)

[2] Section 37(j) of the Act requires a sample analysis of at least 10% of the substance contained in the receptacles. Hence, in order to comply with s. 37(j) of the Act a chemist must clearly state the **actual** amount or weight of the samples he had taken for analysis. Here, the chemist merely stated that he took 20 random samples of the substance for the Deguinos Levine and Thin Layer Chromatography tests without even specifying whether they represented at least 10% of the said substance.

[Appeal allowed; conviction under s. 39B(1)(a) quashed and substituted with conviction under s. 6; death sentence under s. 39B(2) set aside and substituted with 15 years' imprisonment under s. 39A(2).]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi yang mensabitkan perayu di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar 4,105g kanabis dan menghukum hukuman mati terhadap beliau. Alasan-alasan rayuan yang dibangkitkan dihadapan mahkamah semasa adalah: (i) bahawa hakim yang bijaksana telah tersalah menggunakan anggapan mengedar di bawah s. 37(da) Akta tersebut terhadap perayu berdasarkan anggapan pemilikan di bawah s. 37(d) Akta tersebut yang mana pada awalnya telah digunakan terhadap perayu; dan (ii) bahawa ahli kimia tidak menganalisa contoh-contoh dari sekurang-kurangnya 10% bahan yang terkandung di dalam bekas tersebut sebelum memutuskan bahawa ianya adalah kesemuanya kanabis seperti yang ditakrifkan dalam dalam s. 2 Akta tersebut.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim yang bijaksana tidak pernah membuat satu keputusan fakta yang nyata dan mengiakan bahawa perayu tersebut sesunguhnya mempunyai milikan sebenarnya kanabis tersebut. Perayu hanya dianggap mempunyai dalam milikannya kanabis tersebut melalui kegunaan anggapan pemilikan di bawah s. 37(d) Akta tersebut selepas hakim yang bijaksana memutuskan bahawa beliau mempunyai di dalam kawalan dan jagaannya kanabis. Akibatnya, hakim yang bijaksana tersalah dalam menggunakan anggapan mengedar tersebut di bawah s. 37(da) Akta tersebut terhadap perayu berdasarkan anggapan berkanun pemilikan di bawah s. 37(d) Akta tersebut, iaitu satu anggapan pada anggapan atau anggapan berganda *(Muhammad Hassan lwn. PP).*

[2] Seksyen 37(j) Akta tersebut memerlukan analisa contoh sekurang-kurangnya 10% dari bahan yang terkandung di dalam bekas tersebut. Oleh itu, bagi mematuhi s. 37(j) Akta tersebut, seseorang ahli kimia mestinya dengan jelas menyatakan jumlah atau berat sebenar contoh-contoh yang telah beliau ambil untuk dianalisa. Di sini, ahli kimia tersebut hanya menyatakan bahawa beliau mengambil 20 contoh-contoh rambang bahan untuk ujian Deguinos Levine dan ujian Thin Layer Chromatography tanpa menentukan samada ianya mewakili sekurang-kurangnya 10% dari bahan tersebut.

[Rayuan dibenarkan; sabitan di bawah s. 39B(i)(a) dibatalkan dan digantikan dengan sabitan di bawah s. 6; hukuman mati di bawah s. 39B(2) diketepikan dan digantikan dengan pemenjaraan selama 15 tahun di bawah s. 39A(2).]

Case(s) referred to:
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(foll)***
Muhammad Hassan v. PP [1998] 2 CLJ 170 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da), (j), 39A(2), 39B(1)(a), 39B(2)

For the appellant - Bachan Singh; M/s Bachan & Kartar
For the respondent - K Muniandy

[Appeal from High Court, Temerloh; Criminal Trial No: 47-2-91]

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

This was an appeal from the decision of the Temerloh High Court which had convicted the appellant on 15 August 1995 for an offence of trafficking in 4,105 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and sentenced him to death under s. 39B(2). The appellant was arrested on 13 January 1991 at about 8.30pm by three police personnel who were on routine crime prevention rounds in Taman KSM Mentakab, Pahang. On entering a lane, the police personnel saw the appellant carrying two packages one in each hand. When the appellant came near them he stopped and when one of the personnel identified himself as the police, the appellant allegedly turned around and tried to run and in the process threw both the packages in the direction of a drain. The appellant was apprehended and the packages recovered. Both the packages were found to contain dried plant material suspected to be cannabis.

The contents of both packages were analysed by the chemist who testified that the dried plant material amounting to 4,105 grams were cannabis as defined in s. 2 of the Act.

At the hearing of the appeal before us, learned counsel for the appellant raised two important issues. Firstly, he argued that at no time did the learned judge make a finding that the appellant was in possession of the alleged cannabis. What the learned judge held was that as he found that the appellant was in custody and control of the two packages therefore the presumption under s. 37(d) of the Act applies and he was deemed to be in possession of the cannabis. Having made that finding he then invoked the presumption under s. 37(da) of the Act. In other words he used the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) of the Act. Therefore the learned judge fell into the same error as the learned judge in *Muhammad b. Hassan v. PP* [1998] 2 CLJ 170.

In that case the issue is the same ie, whether the presumption of trafficking under s. 37(da) of the Act could be properly invoked once a presumption of possession under s. 37(d) of the Act had been established. The Federal Court held that:

> 3(a) As both subsections (d) and (da) of section 37 of the Act are penal provisions, they must be strictly construed and not extended beyond their clear meaning. Since the two subsections are clear and unequivocal their meanings must be determined from the language employed and must mean exactly that they say. Any ambiguity or slip would be a matter for the legislature to consider.
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> (b) There is a clear undeniable distinction between the word "deemed" used in section 37(d) of the Act and the word "found" employed in section 37(da) of the Act. Under section 37(d) there is no need to prove actual possession or knowledge, as upon proof of custody or control by the prosecution, the court must in law draw a presumption of possession and knowledge in favour of the prosecution, unless the other party proves the contrary. On the other hand, the word "found" in the opening phrase of section 37(da) connotes a finding made by the court after a trial by the court.
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> (c) The basic or primary facts needed to raise "deemed" possession and "deemed" knowledge under section 37(d) of the Act and those required to raise "presumed ... trafficking" under section 37(da) are different. In order to invoke the presumption of possession and knowledge under section 37(d), one needs to only prove having had "in custody or under ... control anything whatsoever containing" the drug whereas to arrive at the presumption of trafficking under section 37(da), proof of being "in possession" of the drug is necessary.

(d) In view of the differences between the two subsections, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. To constitute possession which would give rise to the presumption of "trafficking" under section 37(da) there must be an express affirmative finding of possession on the evidence, as opposed to reliance on the legal presumption of possession. The correct approach was to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament.

We find that the situation in the present appeal is no different from that in *Muhammad bin Hassan's* case. The learned judge here made no express affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s. 37(d) of the Act. Having done that, and in view of the amount of the drug involved, ie, 4,105 grams, he proceeded to invoke the presumption of trafficking under s. 37(da) of the Act. We find that the learned judge here had committed the same error when he applied one presumption upon another.

The second issue was on the improper method of analysis adopted by the chemist. The chemist in his evidence testified that his analysis on the dried plant material consisted of four tests, ie, physical examination, microscopic examination, deguinos levine test and the thin layer chromatography test. For the physical and microscopic examinations he examined all the dried plant material. For the other two analysis he had to prepare chemical tests which necessitate taking representative samples. He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s. 2 of the Act. Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but no where has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s. 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. We hold that pursuant to s. 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

In this respect, we refer to the case of *Leong Bon Huat v. Pendakwa Raya* [1993] 3 CLJ 603 where it was in the evidence of the chemist that the total weight of samples taken for analysis was "more than 10%" of the net weight of the material. The Supreme Court held that the expression "more than 10%" was ambiguous and there should be no ambiguity on such a matter where the life of a subject was at stake. The court also held that what was necessary was that the testimony of the chemist upon such a matter must be clear and convincing. In our present case the chemist did not even testify that he took 10% of the total weight of the plant material as required by s. 37(j) of the Act. He merely said he took 20 samples; what, therefore, is the percentage of this 20 samples, is it 10%, less than 10% or more that 10%? We hold that the ambiguity here was far more serious. The court was left in doubt and the benefit of this doubt must be given to the appellant. We find that so far as the charge of trafficking was concerned, the case against the appellant was not proved beyond a reasonable doubt.

In the light of this finding we allowed the appeal, quashed the conviction of trafficking under s. 39B(1)(a) of the Act and set aside the sentence of death imposed. We substituted a conviction under s. 6 punishable under s. 39A(2) of the Act. After hearing and considering submissions on sentence, we sentenced the appellant to 15 years imprisonment from the date of his arrest plus ten strokes of the rotan.